Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General, on behalf of the United States, moves this Court for leave to file a brief as *amicus curiae* after the time limit specified by Rule 42(2) of the Rules of the Supreme Court. Cf. Rule 42(4).

This case raises complex issues of law concerning the applicability of the securities laws of the United States to employees' interests in private pension plans. The court of appeals' decision is the first appellate resolution of those issues.

The Secretary of Labor and the Securities and Exchange Commission took conflicting positions as *amici curiae* in the court of appeals. The Secretary argued that employees' pension interests are not subject to the anti-fraud provisions of the securities laws; the Commission argued that they are. The Department of Justice has not heretofore taken any position on the issues involved. In order to arrive at the views expressed in the accompanying brief, therefore, it has been necessary to engage in several interchanges of written work and in extensive discussions with the Department of Labor and the Securities and Exchange Commission—as well as to consult at all stages with the Secretary of the Treasury and the Pension Benefit Guaranty Corporation, each of whom has statutory responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA).

The formulation of the position of the United States has been unusually difficult in this case because the government agencies most familiar with the operation and administration of pension plans

have had little experience in the interpretation and application of the securities laws, while the Securities and Exchange Commission has had little experience with the operation and administration of pension plans. The difficulties were compounded by the departure from the Office of the Solicitor General, before the work on this case could be completed, of First Deputy Solicitor General Daniel M. Friedman, who had been supervising the formulation of the views of the United States.

While we regret the inconvenience this delay may have caused the Court and the parties,[1] we believe that the views of the United States set forth in the accompanying brief will assist the Court in resolving the issues presented by this case.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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[1] Typescript copies of the brief were served on the parties on the same day they were sent to the printer, July 31, 1978. The brief was thereafter served and filed as soon as printing service permitted.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

1. Whether, for purposes of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (the Securities Acts) an employee's

interest in an involuntary, non-contributory pension plan is a "security," as the Securities Acts define that term.

2. If so, whether the employee's acquisition of that interest is a "sale," as the Securities Acts define that term.

3. If the interest is a "security" acquired in a "sale," whether failure to disclose information that the Employee Retirement Income Security Act of 1974, 29 U.S.C. (Supp. V) 1001 *et seq.*, does not require to be disclosed gives rise to a cause of action under the securities laws.

INTEREST OF THE UNITED STATES

The court of appeals held that the anti-fraud provisions of the federal Securities Acts apply to employees' interests in involuntary, non-contributory pension plans. Many of these plans, such as the one at issue in this case, have been developed through the collective bargaining process and have been increasingly regulated through federal legislation culminating in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S.C. (Supp. V) 1001 *et seq.*

In enacting ERISA, Congress found that the growth in the size and scope of pension and other employee benefit plans, encouraged by preferential federal tax treatment, had been rapid and substantial in recent years, that such plans were affected with a national public interest and had become important

factors in commerce and in industrial relations, and that the continued well-being and security of millions of employees and their dependents were directly affected by these plans. Congress sought to foster the continued growth of such plans and to provide adequate protection to the employees dependent on the plans by establishing minimum federal standards for participation, vesting and funding of pension plans, federal standards of conduct for plan fiduciaries, and a federal guarantee of benefits upon termination of certain types of pension plans. The Secretary of Labor and the Secretary of the Treasury share administration of ERISA; [1] the Pension Benefit Guaranty Corporation (PBGC), a new federal corporation, administers the statute's termination provisions.[2]

The decision below holds applicable to many such plans a significant part of the requirements of another extensive scheme of federal regulation, the Securities Acts. The court of appeals' application of these Acts to pension plans exposes these plans both to the possibility of liability for past failure to act in accordance with the Securities Acts and to the significant costs of such compliance in the future.

The harmonization of these two bodies of federal remedial legislation, the Securities Acts and ERISA, is of direct interest to the United States. The Court's decision in this case will affect the responsibilities of both the Securities and Exchange Commission, which administers and enforces the Securities Acts, and

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[1] See 29 U.S.C. (Supp. V) 1204.

[2] See 29 U.S.C. (Supp. V) 1301 *et seq.*

those agencies of the United States with statutory responsibilities under ERISA: the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation. The Securities and Exchange Commission and the Department of Labor participated as *amici curiae* on opposite sides before the court of appeals.

STATEMENT

Respondent Daniel was a member of petitioner Local 705 of the Teamsters Union from 1950 to 1973. During those years he worked as a truck driver for various employers who hired members of Local 705. In 1955, Daniel was included in a pension plan established by the union and contributing employers (Pet. App. 5-6).

This plan is funded entirely by employer contributions to an irrevocable trust. The amount of those contributions is determined in collective bargaining on the basis of the service performed by employees. The plan is involuntary; that is, the employee is automatically covered. It is non-contributory; the employees pay nothing (Pet. App. 2). It is a defined benefit plan; that is, the amount of the benefit payable to an eligible participant upon retirement is not based on the amount (or even the fact) of employer contributions; the plan pays a specified benefit to eligible retirees (Pet. App. 2).

Under the plan, respondent could receive benefits only if he satisfied the plan's vesting requirement of 20 years' continuous employment (Pet. App. 3). At

retirement in 1973, Daniel had worked more than 22 years in employment the plan covered, but plan officials denied him pension benefits because a three-month involuntary layoff in 1960-1961 was found to constitute a "break in service," so that Daniel did not satisfy the plan's vesting requirement of 20 years of continuous service (Pet. App. 5-7).

In 1974, Daniel filed in the United States District Court for the Northern District of Illinois a class action against Local 705, its parent international union, the pension fund, and one of the plan's trustees, who is also an officer of the local (Pet. App. 1-2). He alleged that the defendants had violated the anti-fraud provisions of the federal Securities Acts, 15 U.S.C. 77j(b), 77q(a), by misrepresenting or failing to disclose material facts concerning the plan's vesting provisions, its actuarial basis and assumptions, and the alleged improper diversion of plan assets (Pet. App. 4). The complaint also alleged that Daniel had relied on these misrepresentations and omissions in continuing his employment covered by the plan. Daniel sought the elimination of the challenged vesting provisions and damages equal to (1) the "pension benefits unlawfully withheld from plaintiff and his class" and (2) any assets that had been diverted from the plan (Pet. App. 5).[3]

[3] The complaint also alleged violations of the union's duty of fair representation under federal labor laws, failure to comply with Section 302(c)(5) of the Labor-Management Relations Act, 1947, 61 Stat. 157, as amended, 29 U.S.C. (and Supp. V) 186(c)(5), common law fraud and deceit, and breach of fiduciary duty. Those allegations were not be-

The district court denied petitioners' motion to dismiss the Securities Acts counts of the complaint, holding that respondent had stated a claim for relief under those Acts.

On an interlocutory appeal under 28 U.S.C. 1292 (b), the court of appeals affirmed. It held that Daniel's participation in the pension plan involved an "investment contract," which the definition of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934 includes. The court first held that Daniel's interest in the plan satisfied each of the elements of an "investment contract" as defined in *Securities & Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 298-299 (Pet. App. 13-21). Second, the court concluded that participants in pension plans must be covered under the Securities Acts, because of the economic importance of pension plans, both to individual participants and to the American capital markets (Pet. App. 21-24). Third, although noting that "[t]he legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans," the court held that "subsequent legislative action and accompanying SEC interpretation" support the view that an employee's interest in a pension plan is a security (Pet. App. 24-32). Finally, again referring to the importance of pension plans to workers and the capital markets, the court held that policy considerations favored the applicability of the Securities Acts to those plans (Pet. App. 32-34).

fore the court of appeals and are not before this Court. See Pet. App. 5 n. 3.

The court further held that Daniel had acquired his interest in the pension plan in a "sale" because he had performed valuable services for his employers (Pet. App. 34-39), and that his complaint therefore stated a cause of action for violation of the anti-fraud provisions of the Acts, which prohibit deception or fraud "in connection with the purchase or sale of any security." 15 U.S.C. 77j(b), 77q(a). See also SEC Rule 10b-5, 17 C.F.R. 240.10(b)-5 (Pet. App. 39-42). The court held, as the parties had conceded, that ERISA had not preempted the anti-fraud provisions of the Securities Acts (Pet. App. 42-48) and dismissed as a "parade of horribles" arguments by petitioners and *amici* that application of the Securities Acts would have a grave adverse impact on national labor policy and on private pension plans (Pet. App. 43-51).[4]

[4] The reasoning of the courts below in this case has been rejected in at least three other district court decisions: *Hurn* v. *Retirement Fund Trust of Plumbing*, 424 F. Supp. 80 (C.D. Cal.); *Wiens* v. *Teamsters*, BNA Pension Rep. No. 132, p. D-5 (C.D. Cal.) and *Robinson* v. *United Mine Workers of America Health and Retirement Funds*, 435 F. Supp. 245 (D. D.C.). In *Schlansky* v. *United Merchants and Manufacturers, Inc.*, BNA Pension Rep. No. 171, p. D-1 (S.D. N.Y.), the court agreed with the reasoning of the court of appeals in this case but dismissed a securities law claim for failure to plead the claim properly. In *Tanuggi* v. *Grolier, Inc.*, BNA Pension Rep. No. 175, p. D-3 (S.D. N.Y.), the court deferred decision on a motion to dismiss a securities law claim as to a voluntary, contributory pension plan, pending disposal by this Court of the petitions for certiorari in this case, noting however that "the rationale of *Daniel* appears strained" (*id.* at p. D-5).

SUMMARY OF ARGUMENT

1. An employee's interest in an involuntary, non-contributory, defined benefit pension plan is not a "security" within the meaning of the Securities Acts, for the employee does not "part[] with his money in the hope of receiving profits" nor is he "attracted [to his job] solely by the prospects of a return on [his pension] investment." *Securities & Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 300; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852, 858. Employees in such plans make no investment in the statutory sense of the term; they do not decide whether to participate in the plan or to invest any particular amount in it. They have nothing to say about what is to be done with the money in the plan or how and where it is to be invested. They have no redeemable or transferable interest in the plan. Daniel does not allege, nor could any employee reasonably allege, that the existence or terms of a pension plan is the sole or even the primary factor in deciding whether to take or keep a particular job. A pension may be one of many material factors influencing such a decision, but that is not enough to make the pension a "security" within the meaning of the Securities Acts.

Furthermore, the legislative history of the Securities Acts is conspicuously devoid of any reference to pension plans, and hearings on amendments to the Acts specifically indicate that employee interests in pension plans were not intended to be covered by the Acts.

2. If the Court concludes, as we submit, that an interest in an involuntary, non-contributory pension plan is not a "security," the decision below must be reversed. If, however, the Court reaches the opposite conclusion, the question then arises whether the employee acquires his pension plan interest in a "sale" as the Securities Acts define that term. We believe that the employee does acquire his interest in a "sale," for he gives value in the form of his labor, and nothing in the statutory definition limits a "sale" to a transfer for cash. The employee's pension plan rights are one stick in the collectively bargained bundle of benefits which passes from employer to employee in return for services.

3. If the Court concludes that Daniel acquired a "security" in a "sale," it should then decide whether, and to what extent, he has a cause of action in the circumstances presented by this case. Any judicial delineation of the contours of a cause of action should take into account that Congress has, in ERISA, enacted a comprehensive statute to establish and protect workers' pension rights. Any interpretation of the securities laws that would engraft onto ERISA remedies under those laws enacted 40 years earlier and never before applied to pension plans should be adopted with caution lest the carefully designed scheme of Congress be disrupted.

Where, as here, Congress has provided specific directions on what information must be disclosed to the employee, such directions should be deemed to embody, for Securities Acts purposes, everything that is mate-

rial. If there has been compliance with ERISA's disclosure provisions there should be no liability under the Securities Acts for failure to disclose additional information. Moreover, because of the peculiar need to avoid the diminution of pension funds that would result from unanticipated claims and liabilities, any liability should be entirely prospective, making actionable under the securities laws only misrepresentations that occur after the announcement of this Court's decision.

ARGUMENT

I.

AN EMPLOYEE'S INTEREST IN AN INVOLUNTARY NON-CONTRIBUTORY PENSION PLAN IS NOT A SECURITY UNDER THE FEDERAL SECURITIES LAWS

Although the resolution of the primary issue in this case may have a great impact upon the financial soundness and administration of the country's pension plans, the issue itself is narrow. The question is whether an employee's interest in an involuntary, non-contributory, defined benefit pension plan is a security under the federal securities laws (and, if so, whether that interest is acquired in a sale), so that the employee may maintain an action for damages under the anti-fraud provisions of those laws based upon alleged misstatements and alleged non-disclosure of material facts in connection with his participation in the plan.

Here the employee had no choice whether to participate in the plan; he was automatically enrolled in it as a result of his employment. He did not directly make any payments to the plan. But since the plan was developed through collective bargaining, the employers' costs for the plan were one element in the total package that the employers provided as employee compensation. If there had been no pension plan, the employers presumably would have either paid the employees higher wages or furnished them other equivalent benefits. To that extent the employees' participation in the plan cannot realistically be viewed as wholly non-contributory, even though they did not directly pay anything to it as investors ordinarily do when purchasing securities or making other investments.

This case therefore does not involve any issue concerning the treatment under the anti-fraud provisions of the federal securities laws of employee interests in pension plans where the employees have the choice whether or not to participate or where their participation permits or requires them to make direct payments to the plan. As we suggest below, the latter types of pension plans may implicate different policies and considerations and may call for conclusions different from those we have reached with respect to this particular kind of plan.

Similarly, since the conduct upon which the claims in this case are based took place before Congress enacted ERISA in 1974, there is no occasion for the Court here to consider to what extent, if any, ERISA

precludes the assertion of claims under the anti-fraud provisions of the federal Securities Acts based upon alleged fraud in the operation of pension plans committed after 1974.

The court of appeals' conclusion that Daniel's interest in the Local 705 pension plan was a security rested upon three propositions: (1) the interest constitutes an "investment contract" (which the definition of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934 includes) under the decisions of this Court defining and applying that term; (2) certain actions of Congress subsequent to the enactment of the 1933 and 1934 Acts support that view; and (3) the Securities and Exchange Commission has consistently interpreted the term "security" in those Acts to cover interests in pension plans. Our submission is that, although the question is close, on balance, the materials upon which the court of appeals relied do not justify its conclusion, but rather support the contrary view.

A. The definition of "security" in the 1933 and 1934 Acts does not cover an employee's interest in an involuntary non-contributory pension plan.

Section 2(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(1), defines a "security" as

> any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The definition of "security" in Section 3(a)(10) of the 1934 Act, as amended, 15 U.S.C. 78c(a)(10), is virtually identical, and we therefore focus our discussion on the definition in the 1933 Act. Cf. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 847 n. 12.

In *Forman*, this Court's most recent decision involving the meaning of "security" under the federal Securities Acts, the Court stated (421 U.S. at 852) that the "touchstone" of "the Court's decisions defining a security * * * is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." The Court quoted with approval (*ibid.*) its statement in *Securities & Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 300, that "[i]n such cases the investor is 'attracted solely by the prospects of a return' on his investment." "What distinguishes a security transaction," the Court continued in *Forman* (421 U.S. at 858), "* * * is an investment where one parts with his money in the hope of receiving profits from the efforts of others * * *." Again quoting

Securities & Exchange Commission v. *W. J. Howey Co.*, *supra*, 328 U.S. at 301, the Court said (421 U.S. at 852) that the test for determining whether a particular transaction is an investment contract is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."

Daniel's interest in the Local 705 pension plan involves some, but not all, of these elements—and those that are present are in a somewhat diluted form. The pension plan is in a sense a "common venture" or "enterprise," from which the participants expect to derive pension benefits which may be payable in part from anticipated "profits * * * from the efforts of others." The plan is a pool of capital that is the source of pensions for the employees whom it covers. The assets of the plan are invested to conserve the capital and to generate earnings through the receipt of interest and dividends and, it is hoped, of capital gains. While these "profits" of the plan (cf. *Forman*, *supra*, 421 U.S. at 852) cannot increase the defined benefits to which eligible participants are entitled (see p. 4, *supra*),[5] they may affect the financial ability of the plan to pay pensions when they accrue. The participants in the plan have no direct control over its management and operation; that is solely in the hands of others,

[5] The ceiling on the amount of benefits provided by the "defined benefit" aspect of the plan is, of course, analogous to similar characteristics of preferred stock or bonds.

namely, the trustees and managers of the plan.[6] The financial success of the plan depends upon the skill of those persons as well as on continuing employer contributions.

On the other hand, the fact that the plan is a "defined benefit" plan means that a participant in the plan never acquires any interest or right in contributions made with respect to his or her own hours of employment. The participant cannot redeem his "interest" or transfer it, but can only receive, upon satisfying the plan's vesting conditions, benefits fixed at a level which is unlikely to vary with the investment performance of the plan.[7]

[6] Employees control the managtment of the fund only indirectly, through election of half the fund's trustees. See 29 U.S.C. (and Supp. V) 186(c)(5)(B).

[7] ERISA now provides considerable assurance that an eligible participant's expectation of receiving the benefit promised by a defined benefit plan will be met, regardless of the plan's investment profits or losses. First, defined benefit plans subject to ERISA must satisfy a minimum funding standard. Somewhat oversimplified, the effect of this provision is to require the plan to compute its expected liability for benefits and allow amortization of that liability over a 30- or 40-year period, and to require the contributing employers to make contributions sufficient to amortize unfunded liability. 29 U.S.C. (Supp. V) 1082. If the plan's investments prosper, the employers' contributions will decrease; if the investments are not successful, the contributions must be increased to an amount necessary for amortization. In neither instance does investment performance directly affect benefits payable to participants (although investment performance may of course affect future bargaining for plan benefits).

Second, the Pension Benefit Guaranty Corporation (PBGC), established under Title IV of ERISA, 29 U.S.C. (Supp. V)

What this arrangement lacks to make it a security is the element of investment by the employees. An investment involves a decision by the investor to commit his capital to a particular venture. There is an element of choice, the selection by the investor of a particular investment medium. It is, as this Court recognized in *Forman*, a situation where "one parts with his money." By definition, the Local 705 pension plan is involuntary, i.e. participation is both automatic and mandatory. Its participants, including Daniel, make no decision whether or to what extent they will participate in the plan. Since there is no investment decision, the participants can not realistically be viewed as "investors" in the plan. They had nothing to say about what would be done with the money in the plan; how and where it would be invested; for how long; whether for income or for capital gain; and when particular investments would be terminated or changed. All those investment decisions were made by the managers of the plan, not by its beneficiaries.

Of course, when an individual purchases shares in a mutual fund, he also has no control over the

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1301 *et seq.*, is liable to pay basic vested pension benefits (up to a stautory maximum, currently about $1,000 monthly) in most private defined benefit plans which terminate without adequate funding. Although PBGC is not required to cover multi-employer plan terminations until July 1, 1979, it has discretion to guarantee benefits under such plans and is currently doing so in some instances. Thus, the investment success of a defined benefit plan primarily affects contributing employers and the PBGC, and is of limited interest to plan participants.

fund's investment of the proceeds. He does, however, make the initial decision whether or not to buy the shares at all, and he selects the particular fund in which to invest. He also can terminate his investment at any time by selling or redeeming the shares.

In contrast, the participants in the Local 705 pension plan have none of these options. They have no choice whether or not to be covered by the plan, no redeemable or transferable interest in the plan, and no say about the investment policies or practices of the plan. They are not, in any realistic sense of the term, "investors" in the plan—and in determining whether their participation involves a "security," "form should be disregarded for substance and the emphasis should be on economic reality" (*Tcherepnin* v. *Knight*, 389 U.S. 332, 336, quoted with approval in *Forman, supra*, 421 U.S. at 848).[8]

It would be equally unrealistic to conclude that Daniel made an investment decision when he decided to accept or retain employment with a firm, the employees of which were covered by the Local 705 plan. Daniel alleges (Pet. App. 6) that the promise of a pension from the Local 705 plan was a "material factor" in his decision to continue working for em-

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[8] While it might be argued that the considerations on which we rely in concluding that no "security" is involved here relate instead only to the question whether the particular transaction is a "sale" (discussed in point II, *infra*), we would disagree. In this Court's decisions in both *Howey* and *Forman*, on which our analysis is based, the fact of sale was undisputed and the only question was whether the interest sold was a security. See *Howey, supra*, 328 U.S. at 297-298; *Forman, supra*, 421 U.S. at 842 and n. 4, 848.

ployers covered by the plan. Without minimizing the role that the existence of a pension plan may play in a decision to take a job or in a series of decisions to continue in a particular job, it is not realistic to view these decisions as primarily or substantially decisions about investment in a pension plan. Rather, as a matter of "economic reality," the decisions would normally be based upon factors such as the wages, working conditions, types of work and opportunities for advancement that the job offered. The existence or terms of a pension plan may arguably be an additional such factor, but surely no more than that; the employee is not "'attracted [to the job] solely by the prospects of a return' on [his pension] investment." *Forman, supra,* 421 U.S. at 852. Cf. *City of Los Angeles, Department of Water and Power* v. *Manhart,* No. 76-1810, decided April 25, 1978, slip op. 13 n. 30.

Notwithstanding Daniel's assertion about the material influence of the Local 705 plan on his emmaterial influence of the Local 705 plan on his employment decision, we believe that Congress has legislated—and that the Court should interpret that legislation—on the basis of the common perception, as stated by former SEC Commissioner Purcell, that "as a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan" (Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and For-

eign Commerce, 77th Cong., 1st Sess. 896 (1941)). The federal securities laws are designed not to regulate employment decisions but "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions" (*Securities & Exchange Commission* v. *Ralston Purina Co.,* 346 U.S. 119, 124). Daniel made no investment decision when he automatically became a participant in the Local 705 pension plan, and the interest which he acquired in the plan was not a "security." [9]

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[9] The court of appeals based its conclusion that Daniel's interest in the pension plan was a security upon the additional theory that, because private pension plans are of "immense importance" in the capital markets, "[i]f the sole investment vehicles for tens of millions of Americans which in the aggregate control a quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized" (Pet. App. 24). But the alleged difficulty of policing the capital markets that might result if interests in involuntary non-contributory pension plans are not securities cannot change the basic nature of those interests. For the reasons explained in the text, those interests lack an investment decision, the essential element of a security. This Court rejected a somewhat comparable argument in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197-201. Moreover, reversal of the decision below will in no way impair the effectiveness of the securities laws to police securities transactions that pension plans make in the capital markets. See *Securities and Exchange Commission* v. *Garfinkle,* [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,020 (S.D. N.Y.).

B. Congressional action subsequent to the 1933 and 1934 Acts with respect to pension plans does not support the view that interests in those plans are securities.

The court of appeals recognized (Pet. App. 25) that "[t]he legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans." The court concluded, however, that "subsequent legislative action and accompanying SEC interpretation" (*ibid.*) indicate that Congress understood and intended that interests in pension plans are securities. This subsequent legislative history involves various amendments to the legislation and Commission testimony at congressional hearings, all of which occurred between 1941 and 1970.

In none of this history did Congress explicitly state that interests in pension plans are securities. The court's conclusion that they are securities rests upon certain inferences the court drew from various changes Congress made in the legislation and its treatment of certain proposed amendments to those statutes, some of which the court viewed as congressional approval of the Commission's interpretation that these interests are securities. Legislative history of this type, involving actions long after the original enactment of the legislation, provides a dubious basis for determining what Congress meant years earlier. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132; *Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 269; *United States* v. *Price*, 361 U.S. 304, 313. This is particularly so with respect to the Investment Company Amendments Act of 1970, 84 Stat. 1413, upon which the

court placed considerable weight (Pet. App. 27-32). Reliance upon that history involves an attempt to determine the meaning of legislation enacted in 1933 and 1934 on the basis of changes made in another act 36 years later.

1. ***The 1941 Hearings on proposed amendments to the 1933 and 1934 Acts.***

The first significant congressional review of the 1933 and 1934 Acts came in 1941, when the House Committee on Interstate Commerce considered more than 80 proposed amendments to the two Acts.[10] The Securities and Exchange Commission believed that interests in pension plans were securities, and it proposed an amendment that would have exempted from the registration requirements of the 1933 Act those pension plans that met six specific investment and disclosure standards the Commission had formulated.[11] The principal witnesses on this issue were Murray W. Latimer, chairman of the Railroad Retirement Board and a recognized expert on pension plans, and Commissioner Ganson Purcell, who represented the Commission before the Committee. Representative Wolverton, the ranking minority member of the Committee, was the principal opponent of the amendment on the Committee.

[10] Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. (1941) (hereafter "1941 Hearings").

[11] See 1941 Hearings, *supra*, at 908, 919. The committee rejected the amendment.

Latimer, testifying in support of the Commission's amendment, urged that certain aspects of pension plans, such as the amount of benefits and the vesting periods, be disclosed to employees so that they could make an intelligent decision whether to enroll (1941 Hearings, *supra*, at 866-875). Representative Wolverton, however, sharply disputed Latimer's assumption that the Commission had jurisdiction over pension plans. He stated (*id.* at 878):

> I was a member of this committee when the Securities Act was enacted. The matters that you are now bringing to our attention, to the best of my knowledge and recollection, were never even mentioned in connection with the Securities Act. This is something totally foreign to what we had under consideration at that time.

Representative Wolverton concluded (1941 Hearings, *supra*, at 878):

> If jurisdiction over employee pension and welfare funds is important—and I am not disputing that question at the moment—it does not seem to me that the Securities and Exchange Commission is the one to have the jurisdiction over such matters.

Commissioner Purcell stated that "[c]ertain plans are now subject to the Securities Act and the registration requirements" and "[c]ertain plans we are desirous of exempting from registration under appropriate safeguards" (*id.* at 887-888). Representative Wolverton interrupted to ask, "[b]efore you finish your statement today, will you show just how you

get this jurisdiction under the Securities Act? * * * Supervision of pension plans, and so forth, were never considered to come under the Securities Act" (*id.* at 888). Commissioner Purcell answered that Section 2(1) of the Act, which defines "security" to include an "investment contract," was the basis for the Commission's assertion of jurisdiction, because "any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract'" (*id.* at 895).

Purcell then suggested a second theory of jurisdiction, which the court of appeals relied upon here (Pet. App. 25-26):

> In addition to the detailed language of the act itself, there is legislative history which has made it quite apparent to the Commission that Congress intended investments in employees' plans to be included within the term "security." You may remember that among the proposals for amending the Securities Act [of 1933] which were advanced in 1934 there was one which would have exempted from registration—* * *
>
>> an offering made solely to employees of an issuer or its affiliates in connection with a bona fide plan for the payment of extra compensation or stock-investment plan for the exclusive benefit of such employees [1941 Hearings, *supra*, at 895].

Purcell noted that the amendment was eliminated in conference because, in the conference committee's

words, "participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public" (1941 Hearings, *supra*, at 895). Therefore, Purcell concluded, "[w]ith this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employees' plans which involve the sale of a security" (*id.* at 896).

After reading the language of the amendment, Representative Wolverton said (*id.* at 904-905):

> Now, I do not take from that language that there was an intention on the part of Congress in the enactment of that legislation to include the type of jurisdiction that has been assumed by the Securities and Exchange Commission over pensions, mutual loan plans, and so forth, and other plans connected with industry.

Nor was Wolverton alone in his skepticism over the Commission's reliance upon the deleted amendment as a basis of its jurisdiction. Representative Paddock later asked Purcell (1941 Hearings, *supra*, at 909):

> Mr. Purcell, in view of the situation now, which now exists, in which the Commission asserts authority under an interpretation of the 1933 act and has as the only legislative reference to the problem we are discussing a negative, and not particularly clear, reference in a conference report, would it not be better for the Commission to come forward now with an amendment which specifically gives it authority over certain plans, rather than to propose exemptions to an authority which is not clearly in the statute?
>
> Commissioner Purcell: No, sir; I would not say so. We respectfully disagree with your statement that it is not presently in the statute * * *.

Representative Wolverton reiterated his view that Congress had not intended to treat interests in pensions as securities in the 1933 Act:

> Mr. Wolverton: Well, the more you talk, and the longer I listened to Mr. Latimer, the more I am impressed with the thought that the subject is so big, of such a character, and covers a field so wide that it should be a matter of special legislation, if it is necessary, and not to be tacked on to the Securities Act like a wart to something that was never intended to apply to it. It just seems to me that you are driving at something in that never was in contemplation when we passed this Securities Act. [1941 Hearings, *supra*, at 913.]

Commissioner Purcell also indicated that the Commission's interest in exempting pension plans from registration covered only voluntary plans, *i.e.*, those in which the employee had the choice whether or not to participate. He explained that the Commission's position was that "[i]f a plan is so set up that participation in it is a condition of employment * * * there is no sale involved," and hence that "compulsory plans do not require registration" (*id* at 896-897).

This history contains no indication that in 1941 the House Committee (which rejected the Commis-

sion's pertinent proposed amendment), let alone the Congress itself, concurred in the Commission's view that an interest in a pension plan is a security under the 1933 and 1934 Acts. Representatives Wolverton and Paddock both questioned the Commission's position. Representative Wolverton was the ranking minority member of the Committee and had been on the Committee when it drafted the 1933 and 1934 Acts. His and Congressman Paddock's statements apparently are the only expressions by members of the Committee with respect to whether an interest in a pension plan is a security. Moreover, 10 members of the Committee in 1941 had been on the same Committee in 1933 and 1934, which had drafted the initial regulation; none of them challenged Representative Wolverton's repeated statements that in 1933 the Committee did not believe that it was including pension plans within the statutory definition of a security.

2. *The Investment Company Amendments Act of 1970.*

In 1970, Congress amended the Securities Acts and the Investment Company Act of 1940, 54 Stat 789. The court of appeals found in these amendments "substantial support for the proposition that an interest in an employee pension fund is a security" (Pet. App. 32). The amendments, however, do not support that conclusion.

Examination of the amendments begins with the general requirement of the Securities Act of 1933 that securities be registered with the SEC prior to sale.

However, 15 U.S.C. 77c(a) exempts certain classes of securities from the provisions of the Act. In 1970 the Senate passed an amendment which would have provided an exemption for

> any interest or participation in a collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with * * * a stock bonus, pension, or profit-sharing plan * * *.

The court of appeals did not dispute the petitioners' argument that the amendment as worded above "relates only to the sale of interests in certain bank collective trust funds and insurance company separate accounts for pension funds [and] the sale to employees of interests in the underlying pension fund is entirely outside [its] scope" (Pet. App. 30). The bill as finally passed by the House, however, was slightly different: it provided an exemption for "any interest or participation in a single or collective trust fund" maintained as above. The addition of the words "single or," said the court, "altered the focus of the exemption to encompass interests in the underlying pension funds" (Pet. App. 31).

The court of appeals attributed the addition of the words "single or" to a supposed desire by the House to adopt a suggestion made by Stannard Dunn, the General Counsel of the Sperry-Rand Corporation, who wrote to the House Committee suggesting that an interest in an employee's pension plan be exempted from registration. This suggestion, if adopted, might

have indicated Congress' belief that an employee's interest in his pension plan was in fact a security which, unless exempted, would have to be registered under the Act. The court of appeals said that it was "[i]n response to this suggestion" that "the Subcommittee reported out a bill with the added phrase 'single or' * * *" (Pet. App. 31).

The difficulty with the court of appeals' conclusion is that, contrary to its assumption, there is no indication that the House's addition of the words "single or" was "[i]n response to this suggestion." In the first place, no reference to the letter or to the suggested change was ever made at the hearing; the letter was simply inserted in the record without elaboration.[12] Second, the suggestion and the amendment are so dissimilar that they do not, without more, appear to be related. If the House was indeed adopting Dunn's suggestion it presumably would have chosen language that would have made it reasonably clear that an employee's interest in a pension fund would thenceforth be exempt from registration. Instead, it chose words that simply exempt from registration an interest in a single bank trust fund as well as in a collective one. Finally, the conference committee, which adopted the House's amendment, reported only that the amendment "codifie[s] a long established administrative practice of the Commission by making it clear that this exemption applie[s] not only to collective trust funds, but also to single trust funds" (Pet. App. 31).[13] There is no indication that the conference committee thought it was dealing with employees' interest in involuntary, non-contributory pension plans.[14]

[12] The Court has previously noted in construing the Securities Acts that "written statements received without comment by the committee and without cross-examination" are of "limited value" and "entitled to little weight." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 and n. 20.

[13] H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970).

[14] The court of appeals also found that "[t]wo subsequent changes in the language of the exemption" supported the conclusion that Congress believed in 1970 that interests in pension plans were "securities." The first such change excluded from exemption, thus requiring registration of, those funds where an amount in excess of the employer's contributions is used to buy that employer's securities. The SEC asserted that this change was necessary to conform the Act to the SEC's longstanding practice of requiring registration in such situations (Pet. App. 31-32). Even if it is assumed that this was the intent of Congress (and the Conference Report says nothing about the change or its significance), the change goes only as far as the "single trust fund" language: that is it excludes from the reach of the exemption certain single trust funds. For the reasons discussed in the text, the reference to single trust funds does not, in this context, include an employee's interest in an involuntary pension plan.

The second change was caused by the first, said the court of appeals (Pet. App. 32). As explained in the Commission's brief before that court, the above exclusion from the exemption provisions

> applied whenever an amount in excess of the employer's contribution was used to purchase *securities* issued by the employer. Since interests in pension funds are themselves securities, the exclusion might have been interpreted to subject to registration all pension plans where any money is contributed to the pension fund directly by employees. In such plans, it could be argued that this money is purchasing securities of the employer—the pension interests. Accordingly, Section 3(a)(2) was amended again to make

3. *Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).*

In 1958, Congress enacted the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997, formerly 29 U.S.C. (1970 ed.) 301 *et seq.*, as the first important piece of federal legislation specifically aimed at regulating pension plans.[15] As this Court observed in *Malone* v. *White Motor Corp.*, No. 76-1184, decided April 3, 1978, slip op. 8, this legislation marked the first "[c]ongressional consideration of the problems * * * of the nearly unregulated pension field" and was the "first step toward protection of the workers' interests in their pensions * * *" (*id.* at 9). Although the WPPDA is generally considered to have been ineffective (it was repealed by the far more

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it clear that the term "security issued by the employer" as used in the exemption did not include the securities consisting of the interests in the pension fund. SEC Br. 34 (emphasis in original; footnotes omitted).

However, the change here discussed does not support the court's conclusion. The change added the phrase "(other than interests or participations in the trust or separate account itself)" to distinguish such "interests or participations" from the securities issued by the employer. It was purely a technical change, passed without any comment or other reference. Again, it goes only as far as the "single trust fund" language, and there is no indication in its adoption that Congress believed that an employee's interest in an involuntary, noncontributory pension plan is a security.

[15] Cf. Section 302(c)(5) of the Labor-Management Relations Act, 1947, 61 Stat. 157, as amended, 29 U.S.C. (and Supp. V) 186(c)(5), which exempts contributions to certain employee benefit plans from a general criminal prohibition against employer payments to employees' representatives.

comprehensive ERISA in 1974), its legislative history sheds additional light on whether Congress believed that employees' interests in their pension plans were securities~~—even though pension legislation and securities—~~even though pension legislation and securities legislation have been handled by different congressional committees.

The Welfare and Pension Funds Subcommittee of the Senate Committee on Labor and Public Welfare, chaired by Senator Douglas of Illinois, conducted an investigation of employee welfare and pension plans and funds; one of the subcommittee's "major objectives" was "[t]o ascertain the scope and effectiveness of existing public and private regulatory controls in the operation of such plans." Hearings on Welfare and Pension Plans Investigations before a Subcommittee of the Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess. (1955). The subcommittee noted the tremendous growth of pension and welfare plans and concluded, "[t]here is no adequate legislation at either the Federal or State level to fully safeguard these welfare and pension funds or the rights of the employee-beneficiaries." S.Rep. No. 1734, 84th Cong., 2d Sess. 6 (1956). Specifically, the subcommittee found that "there are two Federal statutes which have some application to welfare and pension plans. They are [Section 302 of] the Labor Management Relations Act of 1947 [29 U.S.C. (and Supp. V) 186] and the Internal Revenue Code of 1954" (*id.* at 57; footnote omitted). The subcommittee also found that the Internal Revenue Code,

which provided tax exemption for qualifying funds, provided no effective remedy, and concluded (*id.* at 60):

> Thus, with the exception of the ineffective sections of the Labor-Management Relations Act, 1947, and the Internal Revenue Code, as discussed above, there presently exists no Federal statute, regulation, or authority which attempts to protect the rights of the beneficiaries of welfare and pension plans.

The 85th Congress took no action in the pension regulation field, and hearings were held again in 1957, before the same subcommittee, this time chaired by Senator Kennedy. Hearings on S. 1122, etc. before the Subcommittee on Welfare and Pension Plans Legislation of the Senate Committee on Labor and Public Welfare, 85th Cong., 1st Sess. (1957). In opening the hearings, Senator Kennedy reiterated the "inadequacy of present laws" in the area (*id.* at 1), and concluded that the investigations had shown "the inevitability and desirability of some kind of Federal legislation in this imporant field" (*id.* at 2). The full Committee's report clearly implied that the Securities Act did not apply to pensions:

> The inadequacies of safeguards at either the State or Federal level to protect those who rely on the security afforded by these plans are in sharpest contrast to the protection furnished comparable large-scale public savings and investments by the Federal Deposit Insurance Act, the Securities and Exchange Act of 1933 [sic], the Investment Company Act of 1940, and so forth.

S. Rep. No. 1440, 85th Cong., 2d Sess. 9 (1958).

As this Court observed in *Malone, supra*, slip op. 13-14: "The aim of the Disclosure Act was perhaps best summarized by Senator Smith, the ranking Republican on the Senate Committee and a supporter of the bill. He stated:

> * * * [O]ne of its aims is to make available to the employee-beneficiaries information which will permit them to determine, first, whether the program is being administered efficiently and equitably; and, second, more importantly, whether or not the assets and prospective income of the programs are sufficient to guarantee the benefits which have been promised to them."

In short, Congress apparently believed in enacting the WPPDA that it was the first federal legislation aimed at requiring honest dealings (including certain disclosures) between plan sponsors, plans, and employees.

4. *Employee Retirement Income Security Act of 1974 (ERISA).*

Because the limited disclosure requirements imposed by WPPDA proved ineffective in regulating pension plan funds, especially in view of their continued growth after 1958, Congress in 1974, after lengthy consideration, enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (Supp. V) 1001 *et seq.* Unlike WPPDA, ERISA is a comprehensive federal regulation of virtually every aspect of the operation of privately funded pension plans. The voluminous legislative history of this statute again demonstrates Congress' belief that existing

regulation was inadequate and that the 1933 and 1934 Acts did not deal with the problems of pension interests.

The Senate Committee on Labor and Public Welfare, reporting out the bill, noted the huge size and growth of pension plans and stated, "[n]ot until 1958, with the enactment of the Welfare and Pension Plans Disclosure Act, was legislation effected which was specifically designed to exercise regulatory controls over pension and welfare funds." S. Rep. No. 93-127, 93d Cong., 1st Sess. 3 (1973); Legislative History of the Employee Retirement Income Security Act of 1974 by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 589 (Committee Print 1976) (hereafter "ERISA Leg. Hist."). The committee stated that "[a] complete description of the federal regulation affecting the administration of private plans can be found in" the Interim Report of Activities of The Private Welfare and Pension Plan Study, 1971, S. Rep. No. 92-634, 92d Cong., 2d Sess. 91 (1972) (hereafter "Interim Report") (ERISA Leg. Hist., *supra*, at 590).

There, the subcommittee conducted an exhaustive canvass of federal authority over the administration and operation of private pensions, and found that eleven federal departments and agencies exercised some degree of control. With respect to the securities laws,

> [the Subcommittee found that the] SEC does not have direct regulatory authority over private

> pension plans, [but] certain provisions of the federal securities laws which it administers do apply to such plans. These provisions relate primarily to registration of securities and to annual and periodic reports required to be filed with SEC. [Interim Report, *supra*, at 96.]

Specifically, the subcommittee noted,

> [p]ension and profit-sharing plans are exempt from coverage under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*), unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. * * * If the plan's investment in the employer's securities exceeds the employer[']s contribution, both the employer's securities and the interests in the plan must be registered under the Securities Act with SEC. [*Ibid.*]

The court of appeals, quoting the paragraph above, said that the defendants' "quintessential error" was that "[t]hey confuse the requirements of the 1933 Act's registration provisions with the anti-fraud provisions of the 1933 and 1934 Acts" (Pet. App. 44). The registration provisions set up a mechanism of filing while, "[i]n contradistinction, the antifraud provisions * * * are essentially a generalized self-executing prohibition against fraudulent activity" (*ibid.*). However, this distinction, while generally accurate, is immaterial to the congressional understanding being expressed. The subcommittee was setting forth an exhaustive description of federal regulation of pensions, and there is no reason to believe

that it would have wholly ignored the SEC's authority to prevent fraud under Section 10(b), much less that it would have done so without even a note that such matters were beyond the scope of the subcommittee's inquiry.

This is particularly so when one considers that the subcommittee devoted a great deal of its attention to the fact that employees are furnished very little information on the operation of the plans, and that the information furnished is often confusing or inscrutable to the average worker. See, *e.g.*, Interim Report, *supra*, at 74-75, 84-85, 101-107. As the Subcommittee noted in its Interim Report, "[t]here is strong evidence that many participants in private pension plans are forfeiting pension benefits because of inaccurate or incomplete information concerning their rights and obligations under the covering plan" (*id.* at 101). Indeed, the subcommittee criticized the Department of Labor for not satisfactorily enforcing the WPPDA's requirement that pension plans be described to workers, and urged regulation "which will enable [employees] to know what their rights are under their plans, and what they can do to prevent the loss of such pension rights" (*id.* at 107). The subcommittee was therefore very much aware of, and concerned with, the problem of inadequate, misleading or deceptive information conveyed to employees. Furthermore, had the subcommittee believed that the SEC had any responsibility under the Securities Act to prevent such deception, it presumably would have criticized the SEC as well as the Department of Labor.

The subcommittee's desire to make intelligible information available to the employee was shared by the full Committee, which reported to the Senate that the Secretary of Labor's then-existing power under WPPDA to require plan officials to disclose the provisions of the plan is "[t]he only current federal requirement" of disclosure. S. Rep. No. 93-127, *supra*, at 11; ERISA Leg. Hist., *supra*, at 597.

The belief that existing federal law did not deal adequately with the problem of confusing or inadequate information was shared by Senators and Congressmen throughout the legislative deliberations on ERISA. For example, in the floor debate preceding final passage of ERISA, Senator Javits, the ranking Republican on the Senate Committee, said, "[m]any workers are led to believe they are covered by a good pension plan because of nicely phrased booklets and other assurances handed them by their employers. When the time comes for the payoff, they learn that the cold legal phrasing in pension contracts says otherwise" (ERISA Leg. Hist., *supra*, at 4750). Senator Schweiker, a member of the Committee, described "a long list of witnesses" whose "retirement dream turned into a nightmare, due to merger, bankruptcy, or just plain fraud [and] there was simply no Federal law to help them" (ERISA Leg. Hist., *supra*, at 4824).[16]

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[16] The particular failure alleged here—to inform participants that they would forfeit pension rights if they had a short break in continuous service—was well known to Congress. In ERISA, Congress wrote detailed rules to prevent

Thus, in the legislative history of ERISA as in that of the WPPDA, the congressional understanding on which the new legislation was premised does not support, and indeed appears inconsistent with, the proposition that an interest in an involuntary, non-contributory pension plan is a "security" within the meaning of the 1933 and 1934 Acts, or that the SEC had authority to enforce the anti-fraud provisions in that area.

5. *ERISA Oversight Hearings of 1977.*

In October 1977—six weeks after the court of appeals' decision in this case—the Subcommittee on Labor of the Senate Committee on Human Resources held hearings "to explore a number of significant issues that have arisen in the 3 years since enactment" of ERISA. Hearings on S. 2125 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 1 (1977) ("ERISA Oversight Hearings"). During these hearings, Securities and Exchange Commission Chairman Harold Williams reiterated the Commission's views as expressed in its *amicus curiae* brief before the court of appeals in this case, and discussed the court of appeals' decision (*id.* at 106-116). In a subsequent letter to SEC Chairman Williams, Senator Harri-

such occurrences in the future. 29 U.S.C. (Supp. V) 1023(b). Recognizing the great financial burden that retroactive correction of such failures would impose on plans, Congress expressly stated in 29 U.S.C. (Supp. V) 1023(b)(1)(F) that pre-ERISA break-in-service rules remained valid.

son Williams of New Jersey, chairman of both the subcommittee and the full committee, stated (*id.* at 129-130):

> At no time during the period of ERISA's development was it ever stated to me or, to the best of my knowledge, to any other member of Congress that the Securities Acts' antifraud provisions applied to noncontributory, involuntary pension plans, as they have been held to apply by the U.S. Court of Appeals for the 7th Circuit in *Daniel* * * *. * * * [T]he record is devoid of any affirmative statement by the SEC of the proposition it has supported in *Daniel* * * *. * * * In over 40 years [since passage of the 1933 Act] there was no affirmative statement and, most importantly, no action that would have put the Congress on notice.

6. *Conclusion.*

There has not been a single affirmative indication from the Congress or any member of Congress in more than 40 years since the Securities Acts were passed that those Acts apply to employee interests in involuntary, non-contributory pension plans. Representative Wolverton's 1941 comments indicate that no such thought was before the committee that drafted the 1933 and 1934 Acts; the legislative history of WPPDA and ERISA recite the statutory law relevant to pension plans with no indication that the Securities Acts apply to such plans; and the Investment Company Act Amendments of 1970 do not support the interpretation which the court of appeals placed on them, especially when considered in light of the legis-

lative history of ERISA. Furthermore, Senator Williams' letter of December 13, 1977, to Securities and Exchange Commission Chairman Williams, although not, strictly speaking, "legislative history," affirms that the drafters of ERISA never contemplated that the Securities Acts applied to employees' interests in involuntary, non-contributory pension plans.

The Commission, as Senator Williams notes, has taken the contrary view in this litigation, and when pressed to take a position in congressional testimony has suggested that such interests are "securities" within the meaning of the Securities Acts. Senator Williams' letter correctly points out, however, that the Commission's interpretation is not reflected in a course of regulatory conduct or other administrative action. While a theoretical view, such as this, of the expert agency administering the statutes is of course entitled to respectful consideration, it is not the kind of administration interpretation reflected in a consistent course of agency conduct that this Court has held to be entitled to great deference in cases such as *Udall* v. *Tallman*, 380 U.S. 1, 16, and *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210. See the concurring opinion of Judge Tone in this case (Pet. App. 52). For the reasons we have stated, we have concluded that an employee interest in an involuntary, non-contributory pension plan is not a "security" within the meaning of the 1933 and 1934 Acts.

II.

AN EMPLOYEE'S INTEREST IN A PENSION PLAN IS ACQUIRED BY MEANS OF A "SALE."

If, as we submit, an interest in an involuntary, non-contributory pension plan is not a "security," then the decision below must be reversed, for Section 10(b) (15 U.S.C. 78j(b)) and Rule 10b-5, and Section 17(a) (15 U.S.C. 77q(a)) proscribe deceptive conduct only in connection with the sale of "securities." Should this Court conclude, however, that such an interest is a security, the question arises whether the employee's acquisition of such an interest is a "sale" within the meaning of those provisions. For the reasons which follow, we believe that it is.

Section 2(3) of the Securities Act of 1933 provides that the term "sale" includes the "disposition of a security or interest in a security, for value." It is clear enough that the employee gives value, in the form of his labor, in return for his interest in the plan. Cf. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 590-594; *Malone* v. *White Motor Corp.*, No. 76-1184, *supra*, slip op. 6-7. Nothing in the statutory definition precludes holding such a transaction to be a sale, and lower courts faced with the problem have correctly concluded that a sale occurs when an employee receives securities in return for the performance of services. *Collins* v. *Rukin*, 342 F. Supp. 1282, 1289-1290 (D. Mass.); *Securities and Exchange Commission* v. *Addison*, 194 F. Supp. 709 (N.D. Tex.).

This conclusion properly recognizes that the purposes of the statute would be disserved by an interpretation which limited "sales" to transfers for cash. In *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 467, this Court held that shareholders allegedly defrauded into approving a merger had a right to relief under Section 10(b), 15 U.S.C. 78j(b). "Whatever the terms 'purchase' and 'sale' may mean in other contexts," said the Court, "here an alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange."

If the owner of securities agreed to sell half of them to one purchaser for $1,000, and half to another in return for 100 hours' labor, there would be little rationality in a result which found that only one sale had taken place. See *Collins* v. *Rukin*, *supra*. Similarly, if, in a plan other than a defined benefit plan, an employee agreed to work overtime in return for a contribution to his pension fund, there is little doubt that he would be giving value in return for his interest in that contribution. The result here is no different. The employee's pension plan rights are one stick in the collectively bargained bundle of benefits which passes from employer to employee in return for services. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 592-593. Thus, if (contrary to our submission) the pension plan interest is a security, it fits comfortably within the commodious statutory definition of a sale as a disposition for value.

This conclusion is not affected by the fact that the Securities and Exchange Commission has long taken the position that involuntary, non-contributory pension plans are exempt from the registration provisions of the 1933 Act because "there is no sale involved." 1941 Hearings, *supra*, at 896-897 (testimony of Commissioner Purcell). In holding that a corporate merger involved a sale for purposes of the anti-fraud provisions of the Securities Exchange Act, notwithstanding a Commission rule providing that it did not involve a sale for purposes of the Securities Act's registration provisions, this Court in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 466, pointed out that when the context so requires, "the same words may take on a different coloration in different sections of the securities laws * * *." Here, as in *National Securities*, the reasons that may warrant exemption from the registration requirements (basically, the absence of marketing) do not counsel a similarly narrow interpretation of the statutory protection against fraud in connection with all dispositions for value of securities.

III.

ANY CAUSE OF ACTION AUTHORIZED BY THE SECURITIES LAWS IN THIS AREA SHOULD BE COMPATIBLE WITH ERISA

If this Court were to decide that interests in involuntary, non-contributory pension plans are securities and that the employees acquire these interests in a sale, it should then decide whether, and to what ex-

tent, those employees have a cause of action in the circumstances presented by this case. In deciding similar questions in other cases under the securities laws, this Court has of course looked to the language of the Securities Acts and to the kinds of practices Congress intended those Acts to cover. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727-736; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195-206; *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 471-477; *United Housing Foundation, Inc.* v. *Forman*, *supra*, 421 U.S. at 847-848. But the statutory words and legislative history do not conclusively define "the contours of a private cause of action under Rule 10b-5," because the development of private actions under that rule has been a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 737. Cf. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n. 10 ("the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants").

1. *Reconciliation with ERISA.*

Even in a case like the present one in which the allegations relate to conduct occurring in the pre-ERISA period, any judicial delineation of the contours of a cause of action under the securities laws for employees who participate in involuntary pension plans should take into account that Congress has, in ERISA, enacted a comprehensive statute to establish

and protect workers' pension rights. Cf. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-716; *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283. A substantial part of ERISA addresses the general problem presented by this case: what the plan sponsors must tell the employee about the plan and when they must tell it to him. ERISA requires the plan administrator to provide each participant with a "summary plan description" [17] within 90 days after the employee becomes a participant in the plan. 29 U.S.C. (Supp. V) 1021(a), 1022(a)(1), 1024(b)(1). This summary plan description must contain specified information about the plan (including "the plan's requirements respecting eligibility for participation and benefits" and "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits"), 29 U.S.C. (Supp. V) 1022(b), and must be "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. (Supp. V) 1022(a)(1).[18]

[17] The "summary plan description" is typically a substantial printed booklet which may or may not include a copy of the pension plan itself.

[18] Administrators must also furnish any plan participant, upon request, a statement indicating the total benefits which have accrued to that participant, and the unforfeitable benefits accrued. 29 U.S.C. (Supp. V) 1025. They must provide participants in pension plans with benefit status reports at certain times. 29 U.S.C. (Supp. V) 1059. ERISA also requires an annual detailed report on plan administration and operation, including financial statements, to be made to the Secretary of Labor, 29 U.S.C. (Supp. V) 1023, 1024, and this report is available to plan participants for inspection at the

ERISA provides that any plan participant or beneficiary may bring a civil action to recover benefits due him under the plan, to enforce his rights under the plan or to clarify his rights to future benefits. 29 U.S.C. (Supp. V) 1132(a)(1). A participant may also sue to enjoin any violation of the Act or to obtain other equitable relief to enforce any provisions of disclosure or the terms of the plan. 29 U.S.C. (Supp. V) 1132(a)(3).[19] ERISA does not specifically provide a cause of action to a plan participant or beneficiary for damages caused by misleading, deceptive or fraudulent statements made in connection with his plan; there is, in other words, no counterpart to Section 10(b) in ERISA.

It is not our contention that ERISA preempts or repeals the 1933 or 1934 Securities Acts as they might apply to pension plans.[20] ERISA is, however, the first comprehensive legislation regulating pension plans,

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office of the plan administrator, 29 U.S.C. 1024(b)(2), and to the public, 29 U.S.C. (Supp. V) 1026. ERISA further requires that a summary of the annual report be sent to all plan participants. 29 U.S.C. (Supp. V) 1023(a)(1)(A).

[19] ERISA also provides criminal penalties for willful violation of any provision of the reporting and disclosure requirements or regulations issued thereunder. 29 U.S.C. (Supp. V) 1131.

[20] Section 514(d) of ERISA, 29 U.S.C. (Supp. V) 1144(d), provides, with exceptions not here relevant, "[n]othing in this subchapter ["Protection of Employee Benefit Rights"] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law." See, also, 29 U.S.C. (Supp. V) 1144(b)(2)(A).

and, specifically, regulating the relationship between the employee, the plan sponsors, and the plan itself. Any interpretation of the securities laws that would engraft onto ERISA remedies under those laws enacted 40 years earlier and never before applied to pension plans thus should be adopted with caution lest the carefully designed scheme of Congress embodied in ERISA be disrupted.[21]

There appears to be little reason to differentiate affirmative misrepresentations made in connection with the acquisition of an interest in an involuntary pension plan and those made in connection with the sale of any security. For example, if a plan sponsor, intending to deceive, tells an employee that the employee will be eligible for a pension after 10 years' service, when the sponsor knows in fact that the employee will not be eligible until after 15 years' service, then the employee has a cause of action under Section 10(b), 15 U.S.C. 78j(b). See *Ernst & Ernst* v. *Hochfelder*, *supra*.[22]

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[21] We have argued above that Congress did not intend the Securities Acts to apply in any degree to employee interests in involuntary, non-contributory pension plans. The hypothesis of the present discussion is that the Court concludes otherwise, necessitating some reconciliation of the Securities Acts with ERISA.

[22] We do not at this time address the question of damages, or the measure of recovery. The question is not presented on this record, since the courts below denied a motion to dismiss the complaint, and, in light of the fact that the Securities Acts have never before been applied to pensions, the question of damages should await a trial on the merits in the event of remand.

Failures to disclose information, however, stand on a somewhat different footing, for Congress has required plan sponsors to include certain detailed information in the summary plan description. 29 U.S.C. (Supp. V) 1022(b). For example, the description must set forth requirements for eligibility, explain nonforfeitable pension benefits, set out circumstances which may result in disqualification or loss of benefits, and provide information on financing, claim processing, remedies for redress of claims, and so forth, all in language "calculated to be understood by the average plan participant." 29 U.S.C. (Supp. V) 1022 (a)(1). This section represents a carefully considered attempt by Congress to provide the employee with a comprehensive description of his plan. See ERISA Leg. Hist., *supra*, at 4742 (remarks of Senator Williams, Chairman of the Committee on Labor and Public Welfare).

Where, as here, Congress has provided specific and detailed directions on what must be disclosed, such directions should be deemed to embody, for Section 10(b) purposes, everything that is material. Thus, if the plan administrator complies with 29 U.S.C. (Supp. V) 1022, no plan sponsor, trustee or other person should be held liable under the Securities Acts for failing to disclose or provide further information. Such liability would put plan officials in the untenable position of having complied with a specific statutory directive regarding disclosure of pension information, yet vulnerable in a Rule 10b-5

action because a court later decides that the officials should have provided further information.

For example, the court of appeals stated in the present case that the effect of the district court's opinion "is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8% (410 F. Supp. 541, 551) that a member actually will receive pension benefits, * * * or otherwise defendants must face fraud liability under the securities acts" (Pet. App. 8). Nothing in ERISA, however, requires disclosure of "the actuarial probability * * * that a member actually will receive pension benefits." Plan officials should not be required to comply not only with the disclosure obligations Congress has specified, but also with those that a court may require some day in the future.

In sum, the broad authority of the judiciary in defining the contours of a cause of action under Rule 10b-5 (see *Blue Chip Stamps, supra*, 421 U.S. at 737) should be exercised in a manner best calculated to effectuate the will of Congress (*id.* at 727-736; *Ernst & Ernst* v. *Hochfelder, supra*, 425 U.S. at 195-206; *Santa Fe Industries, Inc.* v. *Green, supra*, 430 U.S. at 471-477; *United Housing Foundation, Inc.* v. *Forman, supra*, 421 U.S. at 847-848). Therefore, to the extent that the Securities Acts apply to employee interests in pension plans, ERISA provides appropriate guidance for construing the disclosure obligations under those Acts.

2. *Prospective application.*

In the event that this Court determines that employee interests in involuntary, non-contributory pension plans are protected by Section 10(b), 15 U.S.C. 78j(b), and Rule 10b-5, any liability should be imposed only prospectively, for the reasons recently stated by this Court in *City of Los Angeles, Department of Water and Power* v. *Manhart*, No. 76-1810, decided April 25, 1978. In *Manhart*, the Court recognized that (slip op. 18):

> The occurrence of major unforeseen contingencies * * * jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

We have argued in point I of this brief that Congress has not authorized a cause of action under the Securities Acts in the circumstances of this case. While that conclusion is subject to argument, we see no basis for arguing that Congress has "plainly commanded" retroactive liability in these circumstances under the Securities Acts. Any finding of liability would be a "marked departure from past practice," resulting in "devastating" liability which would be borne "in large part [by] innocent third parties" (*id.* at 19). We recognize that a damage remedy under the anti-fraud provisions, like the award of backpay at issue in

Manhart, should ordinarily not be withheld. Because of the peculiar problems of retroactive liability in the pension plan context, however, here as in *Manhart* liability, if imposed at all, should be entirely prospective, making actionable under the securities laws only those misrepresentations that occur after the announcement of this Court's decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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